No. 45035-6-II

THE COURT OF APPEALS, DIVISION II

IN THE STATE OF WASHINGTON

DANIA, INC., a Delaware Corporation; NORTHWEST WA PROPERTIES, LLC, a Delaware limited liability company, *Appellant,*

v.

SKANSKA USA BUILDING, INC., a Delaware corporation; McDONALD & WETLE ROOFING, INC., a Washington corporation, *Respondents.*

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This matter turns on the legal definition of "nexus" as described in *Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn.App. 592, 54 P.3d 225 (2002). Skanska would equate the finding of a nexus with the legal definition of causation. Dania's position is that nexus should mean as intended by the *Parkridge* court, a "touchpoint" or a "link", but not full causation.

A look at all the evidence in existence in this matter shows the existence of such a link. Skanska prefers to only examine two pieces of evidence, the testimony of "watertightness" of the roof as of December 2005, and that the mineral cap sheet installed in June of 2006 was listed on their "punch list". However, the evidence shows that the cap sheet was clearly called out in the contract between the parties as part of the roof, and the evidence shows that the cap sheet was the only work done on the roof between its December 2005 "watertightness" and the leaking that began later in 2006. Skanska offers no alternate explanation for the leakage. The work done after substantial completion was done on the exact component of the building that failed. This is a nexus.

Taking this evidence in the light most favorable to Dania, the only conclusion has to be that termination of services on the roof was in June of 2006. Skanska failed to come forward with any evidence that the work

performed post-substantial completion was not "arguably work" from which Dania's causes of action arose. The proper date to start the running of the Statute of Repose in this matter is Skanska's actual termination of services in June of 2006. The trial court erred in granting Skanska's motion for summary judgment.

II. ARGUMENT

A. THE COURT SHOULD NOT EQUATE "NEXUS" AND CAUSATION.

The "nexus" requirement is sensible in that it prevents a party from using work done on one component of a structure to justify a later statute of repose on another component. For example, if the post-substantial completion work in this case had been on the landscaping, of course it could not be claimed as the basis to use termination of services as the start of the Statute of Repose. But the post-substantial completion work identified by Dania here was roof work.

Skanska has taken the position that a "nexus", as required between the work completed after substantial completion and Dania's cause of action, means that Dania was required to prove a "causal link". However, Skanska cannot and has not cited any legal authority for the proposition that "nexus" as used in *Parkridge* requires a party to prove causation.

Causation is its own element of the causes of action alleged in this matter. If the *Parkridge* court or those that have followed wished to equate the "nexus" requirement and causation, they could have easily done so. Instead, the language used demonstrates that a "nexus" is merely a touchpoint, a relationship, if you will.

The *Parkridge* court elaborated on their "nexus" decision by describing how it applied in that case:

> This court held that for the contractors performing those final services, the statute ran from the date the last service was provided; but for the others it ran from the date of substantial completion. Here, the work Freeman did after the date of substantial completion and until December 5, 1994 was arguably work from which Ledcor's cause of action arose. In any event, Freeman failed in its burden to show the absence of a genuine issue of material fact on this issue.
>
> Freeman claims that the work performed after the date of substantial completion was "warranty repairs" or "punch list" work that had no nexus to the contract and initial construction work on which the lawsuit is based. Nothing in the record supports this bare assertion. But even if Freeman had provided evidence to support this argument, there would be, at most, a genuine issue of material fact on the question. Summary judgment would not have been proper.

Parkridge at 599-600. It is illustrative to note that if you replace in this quotation the names of the parties therein with the names of the parties in the case at hand, the passage loses no meaning at all. The work done by Skanska after the date of substantial completion was work on the roof.

Furthermore, just like in *Parkridge*, Skanska has alleged and relied upon the argument that because the cap sheet was listed on the written "punch list" that it somehow is not contract work upon which the Court could rely upon to determine termination of services. The *Parkridge* court dismissed the "punch list" designation as meaningful, discussing instead the "nexus to the contract" as the meaningful information. In the case at hand, we see that the cap sheet installation for the roof was included in the original specifications for the project (CP197), thus establishing the installation work for said cap sheet as part of the original contract. Therefore, until the cap sheet was installed, termination of services under the statute of repose could not occur.

The post substantial completion work was roofing work. A nexus exists such that the trial court should have denied summary judgment.

B. SKANSKA IGNORES THE EVIDENCE THAT LEAKING ONLY BEGAN TO OCCUR AFTER THE CAP SHEET INSTALLATION WORK WAS DONE.

Skanska continues to allege that the roof was watertight in December 2005, and that the cap sheet was not installed for watertightness

but for UV protection. However, they continue to ignore one further piece of evidence: That it was only after the cap sheet was installed that leaking began. CP205, 211, 212.

Given that the cap sheet work was the only identified work done on the roof after the date that Skanska claims that "watertightness" was established, and that Skanska has offered no evidence of any other activities on the roof in the time in between December 2005 and the start of the leaking, there is no other conclusion to be reached except that something occurred during the installation of the cap sheet (or attendant to that installation) that has altered the "watertightness" as alleged in late 2005.

Especially on summary judgment, where any inference to be taken must be taken in favor of the non-moving party[1], here Dania, the Court ought to recognize that in the absence of any other evidence, that the work done by Skanska post-substantial completion is work from which the claim has arisen.

III. CONCLUSION

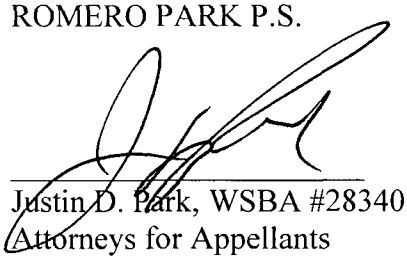
The post-substantial completion work done by Skanska was done on the roof. Prior to that work, the roof was alleged to be watertight. Later,

[1] *Lybbert v. Grant County*, 141 Wn.2d 29, 34-35, 1 P.3d 1124 (2000) (*holding* that summary judgment was improper when the appellate court properly considered the evidence and inferences in favor of the non-moving party's theory of the case); *Hymas v. UAP Distribution, Inc.*, 167 Wn.App. 136, 272 P.3d 889 (2012).

after that work was completed, the roof began to leak. Skanska has not offered any evidence of any other factor involved in the leak. Based on the information in hand by the trial court, a nexus is established and the Statute of Repose should have started to run in June of 2006 at the true termination of services based on the contract between Skanska and Dania. It was error for the trial court to grant Skanska's motion for summary judgment. The Court should reverse that ruling and remand this matter to the trial court to deny to motion for summary judgment and allow Dania to continue with its case against Skanska.

RESPECTFULLY SUBMITTED this 27th day of January, 2014.

ROMERO PARK P.S.



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CERTIFICATE OF SERVICE

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PROOF OF SERVICE

STATE OF WASHINGTON, COUNTY OF KING

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 155 – 108th Avenue NE, Suite 202, Bellevue, Washington 98004.

On the 27th day of January, 2014, I served the foregoing document(s) described below:

REPLY BRIEF OF APPELLANT

on the interested parties in this action by sending true copies thereof addressed to:

Scott Slight Masaki Yamada Ahlers & Cressman PLLC 999 Third Ave, Suite 3100 Seattle, WA 98104 sleight@ac-lawyers.com myamada@ac-lawyers.com	Greg P. Turner Erin Varriano Lee Smart P.S., Inc. 701 Pike Street, Suite 1800 Seattle, WA 98101 gpt@leesmart.com ejv@leesmart.com jaj@leesmart.com

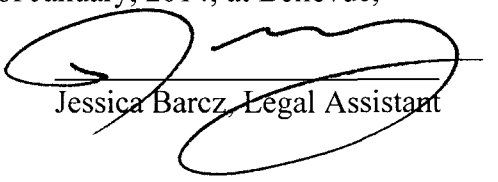
_____ **(BY MAIL)** I caused said envelope(s) with first class postage prepaid to be placed in the United States mail at Bellevue, Washington.

_____ **(BY PERSONAL SERVICE)** I caused said envelope(s) to be delivered by hand to the office or the residence of the addressee as shown above.

XXX (BY ELECTRONIC TRANSMISSION) I caused a true and complete copy of the document described above to be transmitted via e-mail to the email addresses set forth below the name(s) of the person(s) set forth above.

XXX **(STATE)** I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on the 27th day of January, 2014, at Bellevue, Washington.



Jessica Barcz, Legal Assistant